

Briefly

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September 2023 ■ Sonal Hope Mithani, Chair ■ Kevin A. McQuillan, Editor-in-Chief

A (Short) Letter from the Outgoing Chair of the Government Law Section Council

By Soni Mithani

Miller, Canfield, Paddock and Stone, PLC

On behalf of the Government Law Section Council, I want to thank each of you for your membership in our Section, your participation in our conferences, and your readership of this publication. The lawyers in our Section exhibit a level of camaraderie, cooperation, and affability that compares to no other. In no small part that is because government lawyers are driven to serve and to work for the better good of all. It has been my honor and privilege to serve as the Chair of this Section for the past year. We look forward to your continuing membership in the Section and welcome your ideas and participation. Congratulations to our new slate of officers (listed below) and best of luck to them as they embark on a new year of conferences, articles, and bocce!



Soni Mithani

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Government Law Case Summaries

By Debari T. Gordon-Lehman
Bodman, PLC

***Students for Fair Admissions Inc. v.
President & Fellows of Harvard College,*
Docket No. 20-1199 (June 29, 2023)**

In 2003, a divided U.S. Supreme Court ruled in *Grutter v. Bollinger* that the University of Michigan Law School could consider race in its admissions process as part of its efforts to assemble a diverse student body. However, with the Court's decision in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College*, Docket No. 20-1199 (June 29, 2023), that nearly 20-year precedent has come to an end. In the present case, the majority effectively, though not explicitly, overruled its 2003 decision in *Grutter v. Bollinger*. By a vote of 6-3, the Court ruled that the admissions programs used by the University of North Carolina ("UNC") and Harvard College violate the Constitution's equal protection clause, which bars racial discrimination by government entities. In the Harvard case, the Court considered whether the school discriminated against Asian American students in the admissions process. With UNC, the Court considered whether the school was using race-conscious admissions in an appropriately limited manner. The Court held that a student "must be treated based on his or her experiences as an individual — not on the basis of race." The majority opinion stressed that the Court's decision did not bar universities from ever considering race on a case-by-case basis. The majority explained that schools can consider "an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." However, a "benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university." By contrast, the majority explained, programs like the ones used by Harvard and UNC have "concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin."

***VanPelt v. City of Detroit, MI,*
Case No. 22-1680 (June 6, 2023)**

In *VanPelt v. City of Detroit, MI*, Case No. 22-1680 (June 6, 2023), the U.S. Court of Appeals for the Sixth Circuit held that an officer is entitled to qualified immunity when his/her use of force throughout an encounter was objectively reasonable under the circumstances, even assuming the officer could have used a less severe technique. Officer Layne of the Detroit Police Department stopped Plaintiff VanPelt for driving a car with an illegal window tint. After Layne smelled marijuana and ran a check that indicated the license plate did not match the car, he asked the two occupants to get out of the vehicle. Layne cuffed VanPelt to facilitate a search, and after Layne found multiple drugs on him, VanPelt ran. Four seconds later, Layne tackled VanPelt to the ground, then stood and attempted to pull VanPelt to his feet, briefly grabbing VanPelt's hair. VanPelt replied that he could not stand because his hip was broken. Layne released his grip. VanPelt fell back to the ground. VanPelt claimed Layne used excessive force in violation of the Fourth Amendment. VanPelt sued Layne and the City under 42 U.S.C. § 1983 and *Monell*, but the district court granted the Defendants summary judgment, ruling that Layne was entitled to qualified immunity because he did not violate VanPelt's constitutional rights. In affirming this ruling, the Court reviewed the requirements for qualified immunity and considered "what a reasonable officer on the scene would've done and . . . all the circumstances, including 'the severity of the crime,' whether the suspect posed an immediate threat, and whether he was 'attempting to evade arrest by flight.'" The Court concluded that video showed Layne made an "objectively reasonable" decision to tackle VanPelt where he was resisting arrest by fleeing. The Court also determined that it was reasonable for Layne to try to pick VanPelt up, "briefly grabbing VanPelt's hair" where Layne was at that point unaware that VanPelt was injured. The Court held that because Layne's use of force against VanPelt was "objectively reasonable," VanPelt's constitutional rights were not vi-

olated, and Layne was entitled to qualified immunity. Further, because there was no constitutional violation, Defendant-City of Detroit could not be held liable.

***Kutchinski v. Freeland Cmty. Sch. Dist.*,
Case No. 22-1748 (June 2, 2023)**

In *Kutchinski v. Freeland Cmty. Sch. Dist.*, Case No. 22-1748 (June 2, 2023), the U.S. Court of Appeals for the Sixth Circuit held that schools may discipline a student for off-campus behavior and particularly off-campus speech that causes or can reasonably be forecast to cause substantial disruption to the educational environment. H.K., a high-school student, set up a fake Instagram impersonating one of his teachers. The account was benign at first, but soon became graphic, harassing, and threatening when two of his friends added their own posts to the account. News of the account spread fast, fueled by the students' own efforts. H.K. eventually deleted the account, but it was traced to him resulting in a hearing and a 10-day suspension. H.K.'s father sued under 42 U.S.C. § 1983 for free-speech and due-process violations. On appeal, the Court held that "[d]efendants could regulate the speech and discipline H.K. so long as he bore some responsibility for the speech and the speech substantially disrupted classwork" or Defendants reasonably believed it would. H.K. claimed he should not be disciplined since the offending posts were created by his two friends, to whom he provided log-in information. The Court rejected this argument and held "that when a student causes, contributes to, or affirmatively participates in harmful speech, the student bears responsibility for the harmful speech." And it found that "H.K. contributed to the harmful speech" in this case. The Court further explained it was not necessary for the disruption to have "actually occurred," and because the principal "reasonably believed that disruption would take place, she was permitted to take steps to thwart the disruption." Thus, Defendants were entitled to summary judgment on the First Amendment claim. The Court explained that because "schools need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." The Court held that Defendants-school district, superintendent, and high school principal did not violate Plaintiff-student's (H.K.) free-speech rights by regulating his off-campus Instagram

speech. It also held for the first time in the Circuit that a student could be held responsible for the speech of others where he participated by creating the account, giving others access to it, and joking about their posts.

***Cameron v. City of Flint*,
COA No. 361502 (August 17, 2023)**

In *Cameron v. City of Flint*, COA No. 361502 (August 17, 2023), Plaintiff was struck by a police cruiser traveling 76 mph in a 35-mph zone as he rode his bicycle across the road. The officer was responding to a call "to the scene of an alleged shooting" that he understood to be a hostage situation. Plaintiff's BAC was triple the legal limit and he violated traffic laws by riding his bicycle into the roadway immediately in front of a police vehicle that was traveling with its emergency lights flashing. The City contended Plaintiff "was a wrongdoer to whom the officer did not owe a duty." However, the Court held that while Plaintiff's conduct is relevant to the question of causation, binding precedent did not use the "wrongdoer" term to refer to someone simply "doing something wrong, but rather to a person whose conduct gives rise to police pursuit." Thus, the Court held that while officers are excused by MCL 257.603 "from obeying the 'rules of the road,' an officer nonetheless must drive in a manner that does not endanger life or property." The Michigan Court of Appeals further held that Plaintiff "was not a 'wrongdoer' and thus Defendant-police officer owed him 'the same duty of care owed to any other person who does not meet that definition[.]'"

***Woodman v. Department of Corr.*,
Docket No. 163382 and 163383 (July 26, 2023)**

In *Woodman v. Department of Corr.*, Docket No. 163382 and 163383 (July 26, 2023), the Michigan Supreme Court held in an issue of first impression, that an otherwise reasonable attorney fee award may not be reduced because an attorney is representing a party on a pro bono basis. Plaintiffs submitted a FOIA request seeking video and audio recordings of an altercation inside a Michigan correctional facility. MDOC denied the FOIA requests, claiming the records were exempt from disclosure under the penal security exemption. The Court of Claims ordered MDOC to disclose the audio recording to Plaintiffs and eventually ordered it to produce the videos, after an in-camera review. Plaintiffs moved for at-

torney fees and costs. MDOC claimed that because the Court of Claims allowed it to redact the identities of the individuals in the videos, Plaintiffs only prevailed in part. The Court of Claims disagreed. The Court then granted Plaintiffs' counsel's request for attorney fees but reduced the fee award by 90% because counsel represented Plaintiffs pro bono. The Court of Appeals reversed the Court of Claims' finding that Plaintiffs prevailed, concluding they prevailed only in part. The Supreme Court however disagreed, finding Plaintiffs prevailed under MCL 15.240(6) because the action was reasonably necessary to compel the disclosure of the records and because Plaintiffs obtained everything they initially sought; accordingly, the Court of Claims was required to award reasonable attorney fees. Furthermore, the Supreme Court held that pro bono representation was not an appropriate factor to consider in determining the reasonableness of attorney fees; accordingly, the Court of Claims abused its dis-

cretion by reducing the attorney-fee award to Plaintiffs' counsel's law firm due to the firm's pro bono representation of Plaintiffs.

About the Author

Debani T. Gordon-Lehman is a Senior Associate Attorney at Bodman, PLC in Ann Arbor Michigan. Debani focuses her practice on municipal law, representing city leaders, departments, and related entities on a broad range of legal issues faced by municipal governments. Debani also serves in Bodman's Litigation practice group and represents clients in civil disputes involving a broad spectrum of issues.



Impact of *Kandil-Elsayed v. F & E Oil, Inc.* on Municipal Premises Liability Claims

By Kevin A. McQuillan
Kerr, Russell and Weber, PLC

Recently, the Michigan Supreme Court decided *Kandil-Elsayed v. F & E Oil, Inc.*¹ The consolidated cases addressed the open and obvious defense to slip and fall premises liability claims against private landowners. This decision has broad implications for private landowners but the impact on municipal premises liability claims under MCL 691.1402a is unclear at this time. Until now, private landowners owed no duty to invitees "where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them," "unless [the landowner] should anticipate the harm despite knowledge of it on behalf of the invitee." *Lugo v. Ameritech Corp.*, 464 Mich. 512, 516, 629 N.W.2d 384, 386 (2001) (quoting *Riddle v. McLouth Steel Products Corp.*, 440 Mich. 85, 96, 485 N.W.2d 676 (1992)). Now however, the "open and obvious nature of a condition is relevant to breach of a duty and the parties' comparative

fault." *Kandil-Elsayed v. F & E Oil, Inc.*, __ Mich __; __ NW2d __ (Docket No. 162907), 2023 WL 4845611. The Court overruled *Lugo* and overruled the special aspects doctrine. Going forward, "when a land possessor should anticipate the harm that results from an open and obvious condition, despite its obviousness, the possessor is not relieved of the duty of reasonable care."

Whether *Kandil-Elsayed* applies to municipalities may depend on the distinction between the common law duty owed by private landowners to invitees and the statutory duty created by MCL 691.1402a (which applies to municipalities). The majority in *Kandil-Elsayed* began its analysis by noting, "Land possessors owe a duty 'to exercise reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land.'" *Kandil-Elsayed*, 2023 WL 4845611 at *8

(quoting *Bertrand v. Alan Ford, Inc.*, 449 Mich 606, 609; 537 NW2d 185 (1995)). With this common law definition of duty in mind, the majority then analyzed developments in the common law, including analysis of the Restatement Second of Torts and the concept of comparative fault. The majority ultimately concluded that *Lugo* was wrongly decided because it “failed to account for the inherent tension with Michigan’s clear policy of comparative fault.” *Id.* at *18. But the majority’s analysis did not address any statutory premises liability claims (like those brought under MCL 691.1402a regarding municipal sidewalks). Since the Court’s analysis only addresses the common law duty owed by private landowners to invitees, *Kandil-Elsayed* is not on its face applicable to municipal sidewalk claims.

The common law duty owed by private landowners to invitees is not the same as the duty owed by municipalities regarding sidewalks. Under MCL 691.1402a, “[a] municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway shall maintain the sidewalk in reasonable repair.” MCL 691.1402a(1). A municipality is presumed to have maintained the sidewalk in reasonable repair. *Id.* at (3). The plaintiff may rebut the presumption of reasonable repair with evidence of “a vertical discontinuity defect of 2 inches or more” and/or “a dangerous condition in the sidewalk itself of a particular character other than solely a vertical discontinuity” being a proximate cause of the injury. *Id.* at 3(a)-(b).

While the distinction between the common law and statutory duties may seem slight at first blush, the distinction was enough for courts to find for many years that municipalities were not entitled to assert the open and obvious doctrine as a defense to liability under MCL 691.1402a. Prior to 2017, the Court of Appeals repeatedly stated: “The open and obvious danger doctrine cannot be used to avoid a specific statutory duty.” *Kennedy v. Great Atlantic & Pacific Tea Co.*, 274 Mich App 710, 720-721; 737 NW2d 179 (2007); see also *Woodbury v. Bruckner*, 467 Mich 922 (2002) (remanding the case because the open and obvious danger doctrine could not be employed to avoid the application of a duty established by statute), and *Jones v. Enertel, Inc.*, 467 Mich 266, 270, 650 NW2d 334 (2002) (rejecting argument that the open and obvious danger doctrine could be employed to avoid its statutory duty to maintain sidewalks in reasonable repair).

In the wake of these decisions precluding municipalities from asserting the common law open and obvious defense to statutory claims, the Legislature amended MCL 691.1402a to specifically permit municipalities to assert the open and obvious defense.

In a civil action, a municipal corporation that has a duty to maintain a sidewalk under subsection (1) may assert, in addition to any other defense available to it, any defense available under the common law with respect to a premises liability claim, including, but not limited to, a defense



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that the condition was open and obvious. [MCL 691.1402a(5)]

Courts interpreting this amendment noted that “the Legislature inserted language into the statute *addressing a municipality’s duty* to keep sidewalks in reasonable repair, providing that a municipal corporation may now assert common-law defenses, ‘including, but not limited to, a defense that [a] condition was open and obvious.’” *Wilson v. BRK, Inc.*, 328 Mich App 505, 518 n6; 938 NW2d 761 (2019) (emphasis added, quoting MCL 691.1402a(5), as amended by 2016 P.A. 419, effective January 4, 2017).

The Legislature’s decision to amend MCL 691.1402a to allow the open and obvious defense now begs the question of what impact a subsequent change to this common law defense has on a municipality’s statutory defenses. On the one hand, an argument could be made that the Legislature only made common law defenses available, and thus municipalities must abide by *Kandil-Elsayed* just as much as private landowners. But on the other hand, a subsequent change to that common law does not change the Legislature’s intent to make the open and obvious defense against duty available to municipalities when it amended MCL 691.1402a.

Courts are now grappling with this question. For instance, in *Logan v. City of Southgate*, Docket No. 162346 (September 8, 2023), the Michigan Supreme Court vacated and remanded a Court of Appeals decision

involving the open and obvious defense to a municipal premises liability claim under MCL 691.1402a. The Supreme Court ordered the Court of Appeals to reconsider the case given its July 28, 2023 decisions in *Kandil-Elsayed v. F & E Oil, Inc* (Docket No. 162907) and *Pinsky v. Kroger Co of Mich* (Docket No. 163430). Until the question is answered by the Court of Appeals and Michigan Supreme Court, municipalities should be mindful of the changes brought about by *Kandil-Elsayed*.

About the Author

Kevin McQuillan is an attorney at Kerr Russell in Detroit. Kevin’s civil litigation and appellate practice focuses on medical malpractice and municipal law. His municipal practice centers on law enforcement use of force, searches and seizures, free speech, due process, equal protection, and deliberate indifference claims. He also represents municipalities in land use and zoning disputes, Freedom of Information Act (FOIA) and Open Meetings Act (OMA) litigation, and employment disputes.



Endnotes

- 1 __ Mich __; __ NW2d __ (Docket No. 162907), 2023 WL 4845611



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Court of Appeals Confirms Municipalities May Collect Taxes to Fund Pension and Other Benefits for Police and Fire Employees Under Act 345 without Violating the Headlee Amendment

By Sarah Reasoner

Miller, Canfield, Paddock and Stone, PLC

In a matter of first impression, the Michigan Court of Appeals held that municipalities may use tax dollars assessed under the Fire Fighters and Police Officers Retirement Act (a/k/a “Act 345”) to fund police and fire retiree healthcare benefits.

Act 345 was passed in 1937 to create “a system of pensions and retirements” for retired firefighters and police officers. If a municipality’s voters adopt an Act 345 system, Section 9 of the Act provides that the municipality may create a fund for the payment of “pensions and other benefits” for those retirees. In *Bate v. City of St. Clair Shores* and *Ruman v. City of Warren*, two consolidated class action lawsuits, the Court of Appeals clarified that under the plain terms of Act 345, these “other benefits” may include retiree health care benefits (also known as other post-employment benefits, or “OPEB”).

In *Bate* and *Ruman*, a group of taxpayers sued the cities of St. Clair Shores and Warren, respectively, alleging that the cities’ use of taxes collected under Act 345 to fund health care for retired police officers and firefighters was unconstitutional under Michigan’s Headlee Amendment. The Headlee Amendment, enacted and ratified in 1978, requires local voters to approve any locally levied taxes that were not authorized by law at the time the Amendment was ratified. Although the voters of St. Clair Shores and Warren *had* approved taxes under Act 345, the plaintiffs argued that Act 345 *only* authorized the cities to collect taxes to fund pensions for retired police

officers and firefighters. Therefore, the plaintiffs argued the cities would need to get additional voter approval to collect taxes to fund police and fire retiree health care benefits, as well.

St. Clair Shores and Warren both argued that Act 345 was intended to fund broader retirement systems for police and firefighter retirees, not just pensions. In support of this argument, the cities emphasized Act 345’s statutory text referring to “other benefits” and “retirement systems.” The Court of Appeals agreed with the cities, holding that the phrase “‘other benefits payable’ could include healthcare benefits ...” This means that when the cities’ voters approved the collection of taxes under Act 345, they approved the collection of taxes to establish an entire retirement system that may include more than just pensions. The Court of Appeals’ decision clarifies that municipalities may use Act 345 funds to provide retiree healthcare benefits for their police officers and firefighters without running afoul of the statute.

About the Author

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Mission Statement

The Government Law Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, its website, public service programs, and publication of *Briefly*. Membership in the Section is open to all members of the State Bar of Michigan and to law students.

Recent Legislative Changes to the Public Employment Relations Act (“PERA”) Will Impact Unionized Michigan Public Employment Beyond Just Public Schools

By Sarah J. Hartman, Assistant City Attorney and Philip Strom, Deputy City Attorney
City of Grand Rapids

On July 26, 2023, Governor Whitmer signed legislation to help public schools recruit and retain educators and counselors “by undoing restrictions on subjects that can be included in collective bargaining agreements. Additionally, the Bills simplify the process for educators to pay dues.”¹ While many of these legislative changes are solely focused on unionized public-school employers and employees, at least one of the legislative amendments will have a much broader impact on all public sector collective bargaining within the state in the future.

The Public School Bills

The legislative package included three Senate Bills (S.B. 161, 162, and 359) and four House Bills (H.B. 4044, 4233, 4354, and 4820). Six of these seven Bills are narrowly focused on, and make changes which only

effect, public school employers and public-school collective bargaining:

- Senate Bill 161 aims to recruit and retain educators by allowing the state to accept out of state teaching certifications. The Bill also expands the ways educators can earn advanced teaching certificates.
- Senate Bill 162 allows the state to accept out of state counseling licenses under certain conditions.
- Senate Bill 359 aims to bring fairness to how teachers are compensated across the state by requiring a mix of factors to determine compensation.
- House Bill 4233 simplifies the process for public school employees to pay union dues.
- House Bill 4354 removes restrictions on subjects (primarily school-related subjects, such as teacher placement, classroom observations, and parental notifications) that can be included in contract negotiations.
- House Bill 4820 aims to bring transparency to the factors used to fill vacancies and conduct staffing reductions at public schools.

However, House Bill 4044², which repeals Section 15b from PERA, will have a broader impact on public sector collective bargaining because that section of PERA does not only apply to public school employers and employees.

House Bill 4044 – Public Act No. 113 – Repeal of MCL 423.215b

On June 8, 2011, Section 15b of PERA (MCL 423.215b³) went into effect. As originally enacted, Section 15b expressly prohibited all public employers with a unionized workforce from increasing wages or providing



benefits greater than those in effect on the expiration date of the employee's collective bargaining agreement and until a new contract was in place. This prohibition on increased pay and benefits included a freeze on wage step increases. Additionally, increased wages and benefits under a new contract could not be made retroactive to the expiration date of the former contract. Finally, employees whose wages had been frozen remained responsible for any increased costs of maintaining their insurance benefits after a contract expired.⁴

Section 15b was first amended on October 14, 2014.⁵ The 2014 amendment exempted certain public employees from the wage freeze and the prohibition on retroactive wage and benefit increases. This exemption pertained to employees who are required to participate in arbitration to settle labor contract disputes under 1969 P.A. 312 (MCL 423.231, *et seq.*, commonly known as "Act 312") (generally, police officers, firefighters, and public emergency medical service personnel). The 2014 amendment of Section 15b maintained that all public employees were responsible for any increased costs of insurance benefits but reiterated that those costs for Act 312 employees could not exceed their contribution amounts under the Publicly Funded Health Insurance Contribution Act.⁶

Now, the repeal of Section 15b applies to *all* unionized public sector employees. This means that when any collective bargaining agreement expires which relates to a public employer in Michigan, the prohibition on increasing wages and benefits will no longer exist. Also, groups that were not governed by Act 312 will now be able to bargain for retroactive wages (wage increases that are made later but which are paid retroactively back to the expiration of the contract), instead of being barred by law from receiving those increases. Finally, the statute will no longer provide a mandate that public sector employees who have insurance benefits must pay for increases to those benefits even if the parties are continuing to operate under an expired contract.

Many public employees fall outside of the category of public-school teachers. Groups now eligible for wage and benefit increases and retroactive compensation include unionized public employees that are employed in libraries, courts, departmental management, and skilled trades. The repeal removes a tool that helped motivate all parties to reach a timely contract negotiation before (or shortly after) the expiration of the collective bar-

gaining agreement.

H.B. 4044 goes into effect 91 days after the final adjournment of the 2023 Regular Session of the Legislature (March 31, 2024).

Impacts Moving Forward

Collective bargaining sessions may likely take longer and accrue more personal, professional, and legal costs. Many public employees will be working for a longer time without an effective contract as parties negotiate over whether to make compensation and benefit increases retroactive. Both public employers and unions representing public employees will incur more expenses related to the extended negotiations. Finally, the Michigan Employment Relations Commission ("MERC"), will likely be tasked to help settle more disputes around the appropriateness and applicability of retroactive compensation and retroactive benefit changes. MERC is charged with enforcing PERA, as "PERA is a 'highly specialized politically sensitive field of law.'"⁷ Section 15b is part of PERA, thus, is within MERC's jurisdiction to apply and interpret.

While the legislative analysis⁸ provided no formulaic predictions related to the fiscal impact of repealing Section 15b, these new potential employee benefits may create new costs for certain public employers (such as public schools and other public employers not subject to Act 312 arbitration) that were not previously subject to retroactive benefits. This change may also impact annual budgeting, public employer pensions, and post-employment benefit systems for critical public services.

Strategic Considerations

These changes become effective March 31, 2024. The first public employment contracts negotiated under the revised PERA (absent Section 15b) will influence subsequent contract negotiations for other public employers in Michigan. Bargaining teams, fiscal representatives, and decision makers involved in setting strategic priorities should begin the conversation regarding retroactive benefits now to be adequately prepared for the coming changes. Future MERC decisions may also help collective bargaining attorneys set expectations and priorities for their clients.

Endnotes

- 1 <https://www.michigan.gov/whitmer/news/press-releases/2023/07/26/whitmer-signs-legislation-to-recruit-and-retain-educators>
- 2 <http://legislature.mi.gov/doc.aspx?2023-HB-4044>
- 3 <http://legislature.mi.gov/doc.aspx?2011-HB-4152>
- 4 Legislative Analysis as reported from Committee on 6/12/2023 <http://www.legislature.mi.gov/documents/2023-2024/billanalysis/House/pdf/2023-HLA-4044-CB0B4D76.pdf>
- 5 <http://legislature.mi.gov/doc.aspx?2013-HB-5097>
- 6 The Publicly Funded Health Insurance Contribution Act provides public employers with the choice between an inflation-adjusted capped contribution or a maximum 80% contribution towards employees' medical benefit plans. A full analysis of the law as originally enacted can be found here: <http://www.legislature.mi.gov/documents/2011-2012/billanalysis/House/pdf/2011-HLA-0007-88186028.pdf>
- Legislative Analysis as reported from Commerce Committee on 2/28/2014: <http://www.legislature.mi.gov/documents/2013-2014/billanalysis/House/pdf/2013-HLA-5097-31A92CFA.pdf>
- 7 *See, Shelby Twp. v. Command Officers Ass'n. of Michigan*, No. 323491, 2015 WL 9268183, at *3 (Mich. Ct. App. Dec. 15, 2015), *aff'd*, 501 Mich. 912, 905 N.W.2d 227 (2017) quoting *Kent Co. Deputy Sheriffs' Ass'n. v. Kent Co. Sheriff*, 238 Mich. App. 310, 313, 605 NW2d 363 (1999).
- 8 <http://www.legislature.mi.gov/documents/2023-2024/billanalysis/House/pdf/2023-HLA-4044-CB0B4D76.pdf>

Legislative Update

By Kester So, Eric McGlothlin, Laura M. Bassett, John Weiss, and Amelia P. Livingway
Dickinson Wright PLLC

As the current legislative session proceeds, there are a number of new laws and bills of public sector interest enacted by or under consideration in the Michigan Legislature. The following are summaries of some of the most pertinent new laws and bills.

Enacted Legislation

- **Civil Rights. PA 64 of 2023** exempts disclosure of information that would reveal the identity of an anonymous party in civil actions alleging sexual misconduct under the Freedom of Information Act. The Act also amends a provision that now allows certain investigating records compiled for law enforcement purposes to be exempted from disclosure if the records would disclose the identity of a party who proceeds anonymously in a sexual misconduct civil action, as described above. Amends sec. 13 of 1976 PA 442 (MCL 15.243).
- **Civil Rights. PA 45 of 2023** amends the Elliott-Larsen Civil Rights Act to prohibit discrimination based on traits historically associated with race, such as hair texture and protective hairstyles such as braids, locks, and twists. Amends sec. 103 of 1976 PA 453 (MCL 37.2103).
- **Economic Development. PA 89 of 2023** adds and defines sales and use tax capture revenues for eligible properties subject to a transformational brownfield plan, includes same in provisions that allow for the use of construction period tax capture revenues, withholding tax capture revenues, income tax capture revenues, and tax increment revenues, and modifies caps on capture of certain categories of captured revenues. Amends secs. 2, 8a, 11, 13, 13b, 13c, 14a, 15 & 16 of 1996 PA 381 (MCL 125.2652 et seq.).
- **Economic Development. PA 90 - 93 of 2023** amends the Brownfield Redevelopment Financing Act to allow tax increment financing (TIF) to be used for

housing development projects through the state's brownfield program, with the approval of the Michigan State Housing Development Authority (MSHDA), and amend the General Property Tax Act, Use Tax Act, and the General Sales Tax Act to provide conforming changes. Amends title & secs. 2, 8, 8a, 11, 13, 13b, 13c, 14, 14a, 15 & 16 of 1996 PA 381 (MCL 125.2652 et seq.); amends sec. 7gg of 1893 PA 206 (MCL 211.7gg); amends sec. 4dd of 1937 PA 94 (MCL 205.94dd) and amends sec. 4d of 1933 PA 167 (MCL 205.54d).

- **Elections. PA 2 of 2023** changes the presidential primary election date to February 27, 2024, and to the fourth Tuesday in February in each presidential election year after 2024. Amends sec. 613a of 1954 PA 116 (MCL 168.613a).
- **Elections. PA 25 of 2023** provides for tabulating absent voter ballots received up to 6 days after an election from an absent uniformed services voter or overseas voter. Amends secs. 759a & 764a of 1954 PA 116 (MCL 168.759a & 168.764a).
- **Elections. PA 81 of 2023** provides for, allows processing and tabulation of absent voter ballots during the early voting period, and allows an absent voter to tabulate the absent voter's ballot in person at a polling place or early voting site. Amends secs. 570, 662, 668b, 674, 736b, 736c, 736d, 736e, 764a, 764b, 764d, 765, 765a, 765b, 768, 769, 795b, 797a, 798b & 805 of 1954 PA 116 (MCL 168.570 et seq.); adds secs. 8, 523b, 720a, 720b, 720c, 720d, 720e, 720f, 720g, 720h, 720i, 720j, 765c & 768a & repeals secs. 14b, 24k & 767 of 1954 PA 116 (MCL 168.14b et seq.).
- **Elections. PA 82 of 2023** provides for signature matching and curing for absent voter ballot applications and absent voter ballot return envelopes. Amends secs. 759, 761 & 766 of 1954 PA 116 (MCL 168.759 et seq.); adds secs. 766a & 766b & repeals sec. 759c of 1954 PA 116 (MCL 168.759c).
- **Elections. PA 83 of 2023** provides for and updates sentencing guidelines for certain Michigan election law violations. Amends sec. 11d, ch. XVII of 1927 PA 175 (MCL 777.11d).
- **Elections. PA 84 of 2023** creates an absent voter ballot and application tracking system. Amends sec. 764c of 1954 PA 116 (MCL 168.764c).
- **Elections. PA 85 of 2023** modifies requirements for absent voter ballot drop boxes. Amends sec. 761d of 1954 PA 116 (MCL 168.761d).
- **Elections. PA 86 of 2023** implements and modifies certain election material retention periods regarding permanent mail ballot voters. Amends secs. 509aa & 811 of 1954 PA 116 (MCL 168.509aa & 168.811) & adds secs. 6, 759e, 759f & 759g.
- **Elections. PA 87 of 2023** expands definition of identification for election purposes. Amends sec. 2 of 1954 PA 116 (MCL 168.2). Tie-barred with SB 0367.
- **Elections. PA 88 of 2023** increases precinct size. Amends secs. 658 & 661 of 1954 PA 116 (MCL 168.658 & 168.661).
- **Holiday. PA 54 of 2023** designated Juneteenth as a public holiday observed on June 19. Amends secs. 1 & 2 of 1865 PA 124 (MCL 435.101 & MCL 435.102).
- **Human Services. PA 53 of 2023** eliminates the asset test for Food Assistance Program eligibility. Amends sec. 10d of 1939 PA 280 (MCL 400.10d).
- **Human Services. PA 105 of 2023** repeals the sunset for the Michigan energy assistance program. Repeals sec. 6 of 2012 PA 615 (MCL 400.1236).
- **Labor. PA 113 of 2023** repeals certain provisions related to the collection of union dues by public school personnel and the freezing of wages and benefits for public employees during contract negotiations. Repeals sec. 15b of 1947 PA 336 (MCL 423.215b).
- **Law Enforcement. PA 44 of 2023** allows a law enforcement agency to collect reimbursement from an employee for law enforcement training if the employee voluntarily leaves employment within a certain timeframe after training ended and allows any employer (not just law enforcement) to collect remuneration or consideration under an optional education repayment agreement in which the employer offers to fund education with the understanding that the employee will repay the costs incurred unless the employee remains with the employer for a specific period. Amends sec. 8 of 1978 PA 390 (MCL 408.478).
- **Law Enforcement Officer. PA 56 of 2023** expands the definition of a peace officer in the mental health

code to include all officers licensed under the Michigan Commission on Law Enforcement Standards Act. Amends sec. 100c of 1974 PA 258 (MCL 330.1100c).

- **Liquor. PA 95 of 2023** eliminates the sunset on a provision that allows certain retailers to fill and sell containers with alcoholic liquor for consumption off the licensed premises under certain conditions (i.e., “cocktails to go”). Amends Sec. 537a of 1998 PA 58 (MCL 436.1537a).
- **Liquor. PA 96 of 2023** allows issuance of liquor license to sporting venues on premises of public universities. Amends sec. 531 of 1998 PA 58 (MCL 436.1531).
- **Traffic Control. PA 39 - 41 of 2023** amend the Michigan Vehicle Code to prohibit, with some exceptions, holding or using a cell phone or other mobile device for, among other things, texts, calls, videos and engaging in social network sites, while operating a motor vehicle. The legislation provides exceptions for specific cases such as hands-free or emergency use. Amends sec. 602b of 1949 PA 300 (MCL 257.602b); amends secs. 319b, 320a & 320d of 1949 PA 300 (MCL 257.319b et seq.) and amends secs. 602c, 732 & 907 of 1949 PA 300 (MCL 257.602c et seq.).
- **Veterans. PA 42 of 2023** declares June 12 of each year as “Women Veterans Recognition Day.” in recognition of women veterans. Creates new act.
- **Water Supply. PA 106 and 107 of 2023** amend the Property Assessed Clean Energy (PACE) Act, which enables local units of government to facilitate long-term financing for the owners of commercial or industrial property for projects related to renewable energy, energy efficiency, or water efficiency. Among other things, the legislation expands the scope of the act to include agricultural property, allow environmental hazard projects to be financed under a PACE program, allow a property owner to waive a guarantee that the amount of savings from a project will exceed the amount of the investment, and establish and define a project category called new construction energy projects, which would be exempted from the requirement that savings exceed investment. These energy projects would have to exceed applicable requirements of the Michigan Uniform Energy Code. Amends sec. 9 of 2010 PA 270 (MCL 460.939) and

amends title & secs. 3, 5, 7, 11, 13, 15 & 17 of 2010 PA 270 (MCL 460.933 et seq.).

Pending Legislation

- **Administrative Procedure. SB 0014** amends the Administrative Procedures Act to eliminate a prohibition on state agencies’ promulgating rules that are more stringent than federal rules. Amends secs. 32 & 45 of 1969 PA 306 (MCL 24.232 & 24.245).
- **Agriculture. HB 4857** prohibits the classification of milkweed as a noxious or exotic weed by local governments. Amends sec. 2 of 1941 PA 359 (MCL 247.62).
- **Campaign Finance. SB 0381** requires certain state officials, such as the attorney general, governor, and secretary of state, to file a financial disclosure report. Creates new act.
- **Campaign Finance. HB 4727** prohibits the use of a gubernatorial candidate’s image or likeness in state funded advertisements within 90 days before the primary or general election for such office. Amends 1976 PA 388 (MCL 169.201 - 169.282) by adding sec. 58.
- **Cities. HB 4835 of 2023** allows a city to contract for the maintenance or improvement of any private road in the city by creating a special assessment district. Amends 1909 PA 279 (MCL 117.1 - 117.38) by adding sec. 5l.
- **Cities. HB 4862 of 2023** prohibits cities from imposing excise tax on the income of nonresidents. Amends secs. 2a, 3, 3a, 3b & 3c, ch. 1 & secs. 11, 13, 15, 16 & 51, ch. 2 of 1964 PA 284 (MCL 141.502a et seq.).
- **Civil Procedure. HB 4421** allows the victims faces to be blurred in certain public video recordings of court procedures. Amends secs. 8, 38 & 68 of 1985 PA 87 (MCL 780.758 et seq.).
- **Civil Rights. HB 4693 of 2023** allows nonelected and uncompensated public bodies that do not allocate public funds to meet remotely. Amends sec. 3a of 1976 PA 267 (MCL 15.263a).
- **Civil Rights. SB 0207 of 2023** prohibits housing discrimination based on source of income, including benefit or subsidy programs. Amends title & sec. 502

of 1976 PA 453 (MCL 37.2502).

- **Constitutional Amendments.** **HJR D** eliminates the state board of education, superintendent of public instruction, and state board for public community and junior colleges. Amends secs. 3 & 7, art. VIII to the state constitution.
- **Counties.** **HB 4925 of 2023** increases the dollar requirements for advertisement of competitive bidding by county road commissions on certain projects. Amends sec. 10 of 1909 PA 283 (MCL 224.10).
- **Counties.** **HB 4880 of 2023** creates the County Law Enforcement Protection Act to prohibit counties from enacting or enforcing any law, ordinance, policy, or rule that limits peace officers or local officials, officers, or employees from communicating or cooperating with appropriate federal officials concerning the immigration status of individuals; to prescribe the powers and duties of certain state and local officials, officers, and employees; and to prescribe penalties and remedies. Creates new act.
- **Courts.** **HB 4850** allows exemption from jury service for certain military personnel. Amends sec. 1307a of 1961 PA 236 (MCL 600.1307a).
- **Economic Development.** **HB 4882** prohibits the Michigan Strategic Fund from providing economic incentives to certain foreign countries and entities. Amends 1984 PA 270 (MCL 125.2001 - 125.2094) by adding sec. 7c.
- **Housing.** **HB 4919** creates a new act providing for a “homeless bill of rights.”
- **Individual Income Tax.** **SB 454** (and **HB 4894**) replaces the disabled veterans property tax exemption with a property tax credit for disabled veterans. Amends secs. 520, 522, & 524 of 1967 PA 281 (MCL 206.520 et seq.) & adds sec. 521; tie-barred with SB 455 (and HB 4895).
- **Land Use.** **HB 4836** modifies the number of parcels resulting from a land division. Amends sec. 108 of 1967 PA 288 (MCL 560.108).
- **Natural Resources.** **HB 4528** modifies regulations for mining of sand and gravel operations with the effect of prohibiting local regulation of sand and gravel mining and trucking and requiring a permit from EGLE. Amends sec. 9115 of 1994 PA 451 (MCL 324.9115) & adds part 639. Tie-barred with HB 4526 and HB 4527.
- **Property.** **HB 4881** prohibits an adversarial entity from acquiring farmland in Michigan. Amends title & secs. 35 & 36 of 1846 RS 66 (MCL 554.135 & 554.136) & adds secs. 36a & 36b.
- **Property tax.** **HB 4741** holds local taxing units harmless for the disabled veteran exemption. Amends sec. 7b of 1893 PA 206 (MCL 211.7b).
- **Property tax.** **HB 4895** replaces disabled veteran exemption with process to apply for an income tax credit. Amends sec. 7b of 1893 PA 206 (MCL 211.7b). Tie-barred with HB 4894.
- **Trade.** **HB 4596** creates a new act to require manufacturers of certain premoistened disposable wipes to include a symbol and a label notice on new products that indicate that the product should not be flushed down a toilet. These requirements would apply to covered products sold, offered for sale, or distributed in Michigan on and after February 1, 2025. Creates new act.
- **Traffic Control.** **SB 134 and 135**, tie-barred, amends, respectively, the Revised Judicature Act and the Michigan Vehicle Code, to create a program which would allow an individual assigned to a specialty court, such as a drug treatment or Driving While Intoxicated (DWI)/sobriety court, to be placed in the program and receive a restricted license from the SOS after installing an interlock device. The requirements also would apply to the revocation of a restricted license and the issuance of an unrestricted license for an individual assigned to the newly established program. Amends secs. 1084 & 1091 of 1961 PA 236 (MCL 600.1084 & 600.1091) and amends secs. 83 & 304 of 1949 PA 300 (MCL 257.83 & 257.304).
- **Veterans.** **SB 176 (Substitute S-3) and 330**, tie-barred, and **SB 364 (Substitute S-1)**, tie-barred to SB 176, amends the General Property Tax Act to require a property tax exemption on real property used and owned as a homestead by a disabled veteran or the veteran’s surviving spouse granted on or after January 1, 2025, to remain in effect until it was rescinded by the individual granted the exemption or denied by the assessor. Amends sec. 7b of 1893 PA 206 (MCL 211.7b).